

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

74-2427
74-2482

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To be argued by
STEVEN A. HERMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
RALPH VALVANO, et al., :

Plaintiffs-Appellees, :

-against- :

BENJAMIN MALCOLM, et al., :

Defendants-Appellants. :

Nos. 74-2427
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DETAINEES OF THE BROOKLYN HOUSE OF
DETENTION, et al., :

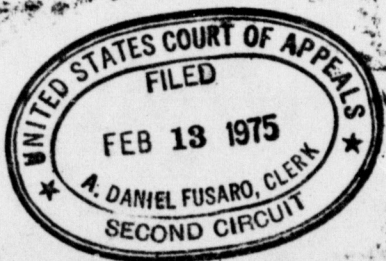
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BRIEF FOR PLAINTIFFS-APPELLEES



WILLIAM E. HELLERSTEIN
JOEL BERGER
STEVEN A. HERMAN
MICHAEL B. MUSHLIN
Attorneys for Plaintiffs-
Appellees
The Legal Aid Society
Prisoners' Rights Project
15 Park Row
New York, New York 10038
[212] 374-1737

2

TABLE OF CONTENTS

QUESTION PRESENTED.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	
INTRODUCTION.....	8
THE FACILITIES.....	10
OVERCROWDING.....	11
A. <u>Double-Celling</u>	12
B. <u>Other Effects of Overcrowding</u>	30
ARGUMENT	
<u>POINT</u>	
THE DISTRICT COURT PROPERLY HELD THAT SUB- STANTIAL OVERCROWDING AT THE BROOKLYN AND QUEENS HOUSES OF DETENTION RESULTING IN THE CONFINEMENT OF TWO PRE-TRIAL DETAINEES IN CELLS ADEQUATE FOR ONLY ONE, VIOLATES APPELLEES' RIGHTS UNDER THE UNITED STATES CONSTITUTION.....	37
CONCLUSION.....	55

TABLE OF AUTHORITIES

CASES:

<u>Commonwealth ex rel. Bryant v. Hendrick</u> , Nos. 353 and 354 (Ct. of Common Pleas, Phila. Co., August 11, 1970), aff'd 448 Pa. 82, 280 A.2d 110 (1971).....	43
<u>Finney v. Arkansas Board of Correction</u> , 505 F.2d 194 (8th Cir. 1974).....	41
<u>Gates v. Collier</u> , 501 F.2d 1291 (5th Cir. 1974).....	53
<u>Hamilton v. Landrieu</u> , 351 F.Supp. 549 (E.D. La. 1972).....	39
<u>Hamilton v. Love</u> , 328 F.Supp. 1182 (E.D. Ark. 1971).....	38,39,40,41,42,53
<u>Holland v. Donelon</u> , Civil Action No. 71-1442 (E.D. La. June 6, 1973).....	39
<u>Hodge v. Dodd</u> , 1 Prison Law Reporter 263 (N.D. Ga. 1972).....	40
<u>Holt v. Sarver</u> , 309 F.Supp. 362 (E.D. Ark. 1970).....	53
<u>Inmates of Suffolk County Jail v.</u> <u>Eisenstadt</u> , 360 F.Supp. 676 (D. Mass. 1973), aff'd as to remedy 494 F.2d 1196 (1st Cir. 1974), cert. denied 43 U.S.L.W. 3248 (October 29, 1974).....	42,44,45,53
<u>Jackson v. Bishop</u> , 404 F.2d 571 (8th Cir. 1968).....	53
<u>Jackson v. Hendrick</u> , No. 71-2437 (Ct. of Common Pleas, Phila. Co., April 4, 1972).....	43
<u>Johnson v. Glick</u> , 481 F.2d 1028 (2d Cir.) cert. denied 414 U.S. 1033 (1973).....	39

<u>Johnson v. Lark</u> , 365 F.Supp. 289 (E.D. Mo. 1973).....	43
<u>Jones v. Wittenberg</u> , 323 F.Supp. 93 and 303 F.Supp. 707 (N.D. Ohio 1971) affirmed sub nom. <u>Jones v. Metzger</u> , 456 F.2d 854 (6th Cir. 1972).....	40,43,48
<u>Kinale v. Dowe</u> , No. 73-374 (S.D. Cal. October 29, 1973).....	40
<u>Obadele v. McAdory</u> , Civil Action No. 72J-103(N) (S.D. Miss. June 8, 1973).....	39
<u>Rhem v. Malcolm</u> , _____ F.2d _____ Docket No. 74-2072 (2d Cir. November 8, 1974).....	3,37,38,39,49, 50,51,52,53,54
<u>Rhem v. Malcolm</u> , 371 F.Supp. 594 and 377 F.Supp. 995 (S.D.N.Y. 1974).....	3,37,49
<u>Taylor v. Sterrett</u> , 344 F.Supp. 411 (N.D. Tex. 1972) aff'd in part, rev'd in part, 499 F.2d 367 (5th Cir. 1974).....	39,40,44
<u>Tyler v. Percich</u> , _____ F.Supp. _____, Civil Action No. 74-40-C(2) (E.D. Mo. October 15, 1974).....	42,43
<u>Wayne County Jail Inmates v. Wayne County Board of Commissioners</u> , Civil Action No. 173217 (Cir. Ct., Wayne Co., Mich., July 28, 1972 and May 25, 1971), aff'd and remanded, 391 Mich. 359, 216 N.E. 2d 910 (Mich. 1974).....	43,48
<u>Wyatt v. Stickney</u> , 325 F.Supp. 781, 334 F.Supp. 1341 (M.D. Ala. 1971), and 344 F.Supp. 373 (1972), aff'd. sub nom. <u>Wyatt v. Aderholt</u> , 503 F.2d 1305, (5th Cir. 1974).....	41,53

OTHER AUTHORITIES:

<u>American Correctional Association, Manual of Correctional Standards</u> (1966).....	13,33,47
<u>Burger, Our Options are Limited</u> , 18 Vill. L. Rev. 168 (1972).....	45
<u>Kaufman, Book Review</u> , 86 Harv. L. Rev. 637 (1973).....	40

McKinney's Multiple Dwelling Law § 31(6) (b).....	48
New York City Board of Correction, <u>Report on the Future of the Manhattan House of Detention for Men</u> (August 6, 1974).....	49
National Sheriff's Association, <u>Manual of Jail Administration</u> (1970).....	47
State of Illinois, <u>Municipal Jail and Lockup Standards</u>	47,48
United Nations, <u>Standard Minimum Rules for the Treatment of Prisoners</u> (1955).....	47
United States Bureau of Prisons, <u>The Jail: Its Operation and Management</u> (1970).....	13,47

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QUESTION PRESENTED

Whether the District Court properly held that substantial overcrowding of the Brooklyn and Queens Houses of Detention resulting in the confinement of two pre-trial detainees in one-man cells violates appellees rights under the United States Constitution.

STATEMENT OF THE CASE

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (Judd, J.) entered on October 2, 1974, enjoining, with certain qualifications, appellants from confining two pre-trial detainees in single occupancy cells at the Brooklyn and Queens Houses of Detention (hereinafter BHD and QHD, respectively).

The Valvano case, a civil rights class action commenced in November of 1970, charged that detainees at QHD were being deprived of their rights under the United States Constitution as a result of brutality by guards and various inhumane living conditions and administrative practices.

Extensive hearings were held on the allegations of brutality in May, June and July of 1971. On November 11, 1971, the court ordered defendants to submit a plan for independent and impartial investigation and prosecution of the brutality charges, and for the establishment of a grievance procedure to deal with detainee complaints. The court reserved jurisdiction over the remaining issues in the case not determined at that time.

The Detainees of the Brooklyn House of Detention case, also a civil rights class action, was commenced in February 1973. The complaint charged that plaintiffs are being deprived of their rights under the United States Constitution because of overcrowding, excessive lock-in, denial of contact visits, restrictive visiting hours, inadequate recreation, restrictive correspondence rules, inadequate health care, inhumane and unsanitary living conditions, and arbitrary searches resulting in the confiscation of legal papers.

On September 7, 1973 the court issued an order providing for a joint trial of issues common to both the Brooklyn and Queens cases. On January 21, 1974 trial commenced on the issues of overcrowding and excessive confinement.*

The court personally toured the Brooklyn and Queens Houses of Detention immediately prior to the trial.

* Trial of the remaining issues was deferred pending disposition of similar issues in Rhem v. Malcolm, a class action in the Southern District of New York concerning the constitutionality of conditions and practices at the Tombs. Rhem has since been decided in plaintiffs' favor on all issues. (See 371 F. Supp. 594 and 377 F.Supp. 995, affirmed F.2d _____, Docket No. 74-2072, (2d Cir. November 8, 1974)).

On July 31, 1974, the court rendered its decision (864a - 877a). After setting forth several findings of fact based on the evidence at trial and noting that even one of the wardens had characterized double-celling as "sort of dehumanizing" (867a), the court held that forcing two detainees to live in single occupancy cells was constitutionally impermissible (875a). As to the remedy to be provided, the court stated:

It may not be practicable to terminate the practice at once, and there may be a few cases where inmates prefer to have cellmates, but the practice should be eliminated as soon as possible. (875a)

The court declined to provide relief to plaintiffs on the issue of excessive confinement, finding that "the problem arises in part from overcrowding..." and "[a]dditional lock-out time can quite likely be provided when double-celling is eliminated." (875a, 876a).

On October 2, 1974, the court entered the judgment appealed from herein.* The court granted defendants a six

* The court had originally entered an order at the conclusion of its opinion of July 31, 1974, but that order was vacated and the October decree substituted following motions for amendment by both parties.

month grace period during which detainees could be double-celled involuntarily for the first 30 days of confinement. After six months, however, non-consensual double-celling was enjoined except for a limited number of special cases:

1) persons enrolled in the methadone detoxification program (maximum period of ten days); 2) persons certified to be in need of mental observation due to depression and/or potential suicide (maximum period of thirty days);* and 3) in cases of certified emergencies (a maximum of thirty days when cell repairs are necessary and ten days in all other emergencies) (920a-922a).

The judgment also clarified that various issues in both cases were still left to be tried (922a).** Two additional

* This time period could be extended, however, if cells containing twice the floor space of the present cells are utilized (921a).

** With regard to Detainees of the Brooklyn House of Detention, this includes the several issues set forth on p. 3, supra. With regard to Valvano, the court specified that the issues concerning disciplinary procedures and correspondence rules remained for decision (922a).

issues in Valvano, restrictive visiting schedules and inadequate recreation, were dismissed without prejudice to plaintiffs raising them in another action (9220).*

The court stayed its order seven days to permit defendants to apply to this Court for a stay pending appeal. However, no such application was made (922a).**

On October 18, plaintiffs moved to have defendants held in civil contempt for failing to comply with the court's order of October 2. Specifically plaintiffs charged that defendants were coercing detainees to consent to double-celling. In an opinion dated November 15, 1974, the court

* Presently, another class action is pending in the Eastern District before Hon. John F. Dooling alleging deprivations of constitutional rights of QHD which were not raised in Valvano. Detainees of the Queens House of Detention, et al. v. Malcolm, et al., 73 C 1364. In addition to the issues of restrictive visiting schedules and inadequate recreation, the complaint charges denial of contact visits, inadequate health care, inhumane and unsanitary living conditions, and arbitrary searches resulting in the confiscation of legal papers.

** In affidavits submitted on November 1, 1974 at a subsequent contempt proceeding, defendants stated that they were in full compliance with the court's order (951a-952a).

stated that "[t]he provision...to permit continued occupancy of standard cells by two men on voluntary consent was not intended to permit easy evasion of this court's factual conclusion that double-celling was dehumanizing" (959a). Although it did not find any deliberate violation of its order by defendants (960a), the court required that a court-approved notice be posted in both jails informing the members of the plaintiff class of their rights under the decree of October 2 (961a-963a).

On October 22, 1974 defendants filed their Notices of Appeal in each case and on December 3, 1974 this Court consolidated the appeals.

STATEMENT OF FACTS

INTRODUCTION

Appellees called eleven witnesses (six detainees, four experts, and one photographer) and introduced ten exhibits. Defendants called four witnesses and introduced twelve exhibits.

Appellees' detainee witnesses, all of whom were incarcerated due to their inability to post monetary bail on pending criminal charges, were Ronald Foy and Raymond Moctezuma, confined in the Brooklyn House of Detention (98a-99a, 201a, 212a); Ronald Smith, Charles Bruner and Robert Finley, confined in the Queens House of Detention (149a-150a, 258a, 429a-430a);* and Antonio Negrón, who was released from the Brooklyn House of Detention prior to the trial in this case, after more than one year of pre-trial detention, following acquittal by a Kings County jury on the charge for which he had been detained (125a-126, 138a).

Appellees' expert witnesses were Donald H. Goff, Director of the United States Civil Rights Commission's Prisoners'

* Prior to being detained in QHD Mr. Smith had been confined in BHD (149a-150a).

Rights Project, former General Secretary of the Correctional Association of New York, and former Chief of the New Jersey Bureau of Correction (291a-293a); Robert B. McKay, Dean of the New York University School of Law, Chairman of the New York State Special Commission on Attica and Chairman of the New York City Board of Correction (161a-163a); Dr. Augustus F. Kinzel, a New York City psychiatrist, instructor of psychiatry at Columbia University, and former staff psychiatrist at the United States Medical Center for federal prisoners in Springfield, Missouri (372a-379a); Louis J. Gengler, Warden of the Federal Detention Center in New York City (45a-46a); and Lansing Thorne, a professional investigator-photographer employed by the New York City Legal Aid Society, whose photographs of the Brooklyn and Queens Houses of Detention were introduced into evidence and five of which are reproduced in the appendix (846a-855a).

Appellants' witnesses were Arthur Rubin, Warden of the Queens House of Detention (459a); Theodore R. West, Warden of the Brooklyn House of Detention (614a); John Albert Guzman, Assistant Deputy Warden at the Brooklyn House of Detention (714a); and Henry Anthony Cooper, Professor of Law at the New York University School of Law (762a).

The Facilities

The Brooklyn and Queens Houses of Detention are multi-storied maximum security institutions, [317a, 553a, 665a, 789a-790a]. Plaintiffs in both jails are housed in standard steel bar fronted cells approximately 8' x 5' or 40 square feet (858a, 862a).^{*} The actual open floor space in each cell, however, is only 20 square feet because the remaining area is taken up by the cell furnishings: one table, one immovable seat, one unenclosed toilet, one mirror, and two bunk beds (387a, 858a, 862a, 867a).

The housing floors at both institutions have essentially identical layouts. Each floor is divided into four quadrants designated the "A", "B", "C", and "D" sections, and each section is sub-divided into two fifteen cell tiers (856a, 860a). The tiers are bounded by a narrow steel barred corridor into which the cells open (858, 862a, 865a). Each section feeds into a

^{*}The record indicates that although Queens has two 80 man dormitories, neither is occupied by pre-trial detainees. The third floor dorm is utilized to house the institution's sentenced population (858a). The sixth floor dorm is vacant (537a). Similarly, in Brooklyn, with the exception of detainees under mental observation who are housed in a dormitory like setting in the converted 10th floor gymnasium, all detainees are kept in cells (637a, 701a).

dayroom (858a, 862a, 865a). Each section is sealed off from the others, preventing detainees in one section from entering other sections, even on the same housing floor (135a, 210a, 222a).

Overcrowding

Undisputably, the Queens and Brooklyn Houses of Detention are, and for years have been, overcrowded.

The official capacities set by appellants for BHD and QHD are 814 and 520, respectively (856a, 860a). During the years 1969-1973, the average rate of occupancy was 170% for the Brooklyn House of Detention and 153% for the Queens House of Detention (866a). On February 5, 1974, a few days after trial, BHD held 1087 detainees and was operating at 134% of rated capacity (862a). QHD held 670 detainees and was operating at 129% of rated capacity at the time of trial (463a).

The District Court found however, that "[a]ctual overcrowding was substantially greater" than the aforementioned figures would indicate since testimony established that large numbers of cells in both institutions and one dormitory in Queens were not in service (537a-538a, 668a, 866a-867a).*

* In Brooklyn, usually 90 cells are unused (668a), reducing the actual capacity of that institution from 814 to 724. Thus on the day that Brooklyn held 1,087 detainees, the institution
(cont'd on next page)

A. Double-Celling

The most harmful consequence of the chronic overcrowding in both institutions is that two men are crammed into cells built to hold only one man (298a).

Not a single witness defended double-celling and the only explanation for the city's practice was offered by Dean McKay:

The city did it [double-celling] not because it is desirable, but they considered the necessity of the circumstances. I think there is uniform conclusion that it is an undesirable fact (173a).

Indeed, plaintiffs' expert witnesses all condemned the practice of confining two men to a cell as inhumane, violative of the basic human right to privacy, psychologically harmful, and detrimental to institutional security.

Defense witnesses Wardens Rubin and West joined in criticizing the practice. Rubin described double-celling

(* cont'd)

was actually filled to 150% of capacity as opposed to the 134% provided by defendants.

In Queens, an average of 40 cells are vacant at any particular time (537a). In addition, a 6th floor dormitory designed to accommodate 80 detainees is not presently in use (537a). Without the 40 cells, the actual capacity of QHD drops from 520 to 480; and without the dormitory, it drops still further to 400. Accordingly, on the date that QHD held 670 inmates, the institution was actually filled to 167% of capacity, not 129% as it would have been if the dormitory and every cell had been in use.

as "sort of dehumanizing" (604a), and West stated that he preferred to limit cells to a single person (698a).*

The confining of two men in the small cells at BHD and QHD violates all accepted minimal standards for the safe-keeping of detainees. The Manual of Correctional Standards of the American Correctional Association (297a) (hereinafter referred to as ACA Standards) provides that all cells in detention facilities should be designed for, and used by, only one prisoner. Further, the ACA Standards require a minimum cell area of fifty square feet per person (ACA Standards at 49).** Similarly, the United Nations Minimum Standards for the Treatment of Prisoners (297a) (hereinafter referred to as UN Standards) provide that when the sleeping accommodation given prisoners is a cell, each prisoner shall occupy the area by himself. (U.N. Standards at §9(1)).

* Warden West testified that he favored double-celling for: 1) those detainees who requested a cellmate; and 2) those detainees deemed suicide risks (697a-698a). The court provided for such exceptions in its judgment (920a-921a).

** Mr. Goff testified that the National Advisory Commission on Standards and Goals of the U.S. Civil Rights Commission, currently drafting "Minimum Civil and Human Standards for Prisoners," probably will increase the minimum square footage per person from the current ACA Standard of 50 feet to 80 feet (300a).

Testimony established that the policy of the New York State Department of Correctional Services is to house all convicts one to a cell (303a, 171a).*

Donald Goff explained that professionals in the field of corrections find double-celling undesirable "because it tends to increase sodomy, tends to increase aggression" (301a). He described the problems created for detainees and jail administrators alike when two people are confined to so small a space that "they can't move without touching another person" (308a). In such an environment "human compression", as Mr. Goff termed it, creates tensions, and violence flourishes: "...you'll have fights, you'll have problems over personal property" (302a-303a). Even "real minor things begin to grate on one's nerves" (301a-303a):

...double deck beds for example. If you happen to have the bottom bunk, the guy when he gets up to his bunk is going to step on your bed. It's a very minor thing but it is an irritation.... (302a)

* * *

* The individual cells in New York's state prisons are actually somewhat larger than the cells in which defendants presently house two detainees in Queens and Brooklyn. (303a, 171a)

Each one of those little minor things continually adds another drop, another drop, another drop and you increase anxieties, frustrations and you precipitate, set the background for fights (307a).

Because he found the cells in BHD and QHD totally inadequate as a living arrangement for two men, Dr. Kinzel condemned double-celling as "psychologically destructive" (403a). * Dr. Kinzel observed:

The usual response...to this chronic overcrowding is a withdrawal, what some have called cocooning behavior or withdrawing into a shell and each man trying to define...his own territory in the cell (388a).

Dr. Kinzel testified that he would expect increased violence by detainees as a result of confinement in the cells at Brooklyn and Queens. Detainees who were violence-prone would be caused to feel "pressured" and "irritable" by

* Dr. Kinzel based his conclusion that the cells were too small for two men, in part, upon experiments he conducted while staff psychiatrist assigned to the maximum security unit at the United States Medical Center for federal prisoners in Springfield, Missouri from 1966 to 1968. Dr. Kinzel's study on the spatial needs of prisoners, published in the American Journal of Psychiatry, has been essentially duplicated by another psychiatrist, Dr. Hildrith, in an experiment conducted among prisoners in Baltimore, Maryland (378a). Defendants did not present any expert testimony or studies contesting these findings.

the lack of sufficient space in the cells. If two violence-prone persons were confined together there was a "high likelihood" of violence. Even non-violent detainees would experience increased aggression, with the attendant possibility of a physical explosion (400a).

Warden Louis J. Gengler of the Federal Detention Center in New York City agreed that unless "valves" and "releases" are provided the frustrations bred by overcrowding can result in aggression (77a-78a).

Indeed, Warden Rubin's experience at the Queens House of Detention confirmed Warden Gengler's, Mr. Goff's and Dr. Kinzel's fears that overcrowding engenders violence:

[E]veryday you get fights, the officers are breaking up fights, that is part of their job (527).

Moreover, Mr. Goff testified, the "need of an individual for privacy" is violated by double-celling. This too can lead to an increase in fights (302a). Mr. Goff criticized the fact that detainees at Brooklyn and Queens were completely deprived of any privacy by being forced to eat, sleep, defecate and do everything in the presence of another man in a small cell (307a). Dr. Kinzel also stressed the individual's need

for privacy when he spoke of the "humiliation" of being locked in with another person and having to "defecate and urinate in his presence" (394a).

Warden Gengler testified that the "most severe" criticism leveled at correction facilities was the "lack of privacy" afforded occupants (59a). When asked why the new Federal Detention Facility currently being constructed in Manhattan would have single rooms as the basic living unit, he replied:

I believe that to the extent possible, an individual ought to preserve some of his individualism when he enters an institution, regardless of why he is there... [I]t is only good in a penological sense that we try to give an individual as much privacy as possible and restore whatever degree of individualism we can to him... (59a-60a).*

Warden Rubin agreed that when detainees are double-celled they are deprived of the basic human need for privacy. He conceded that in 1972, in an interview with representatives

* Warden Gengler testified that presently at the West Street Detention facility, those men not housed in dormitories are housed in "C-Tanks". Each of these tanks contain several two-man cells. However, the cells are never locked and the men have access to a day room twenty-four hours per day (51a, 95a). At BHD and QHD, detainees are locked into their cells approximately 16 hours per day (871).

of the Correctional Association of New York, he had described how double-celling strips a man of his dignity:

"...whatever little privacy the guy may want or have, he has to share it with another. While using a lavatory, his partner is there with him. It's sort of dehumanizing... It's a little bit dehumanizing in the sense that your whole life becomes public" (604a).

Thus, elimination of double-celling serves an important security function. As Mr. Goff stated:

...correctional people are not a bunch of do-gooders. They are very pragmatic. One of the reasons why we have this emphasis upon one man to a cell and not having individuals in a very tight situation is to reduce problems of administrators.

You reduce your tensions, reduce the administrative problems, reduce the fights, sodomy, the anxieties simply by this technique [single celling]. It is a way of reducing and calming down a population which is normally under pressure anyway (302a).

Six detainees, giving detailed testimony about the most intimate aspects of their daily existence in the two jails, corroborated the expert testimony condemning double-celling.

The men described the cramped quarters of their cells which they are forced to share with another inmate. Raymond Moctezuma said the cells are so small that "we have to climb over things" and are always "bumping into each other" (202a).

Ronald Smith noted that it is impossible for two men to move about the cell at the same time (223a).

In the smallness of the cells, common everyday activities of detainees distract and annoy their cellmates. Mr. Negron testified that it was impossible to do anything without feeling his cellmate's presence:

You want to write a letter, and the guy over here is singing; he wants to change his socks, or whatever... (131a).

...you're going to wash your face, and here's a guy washing his socks ... may jump to take a leak. You got to ... You rumble and everything else ... gets on your nerves (130a).

Charles Bruner noted that it was difficult to read if his cell partner wanted to move around (263a). Mr. Foy said it is impossible to sleep at night when his cellmate remains up, a frequent occurrence (102a). Mr. Moctezuma testified that he is awakened late at night when his cellmate uses the toilet (204a).

The cells are so crowded that even lying on the bed offers no respite from contact with a cellmate. For example, both Mr. Moctezuma and Mr. Bruner testified that if they are lying on the bottom bunk when their cellmates use the sink,

water splashes onto them (204a-205a, 264a). Mr. Bruner also stated that when his cellmate leaves the top bunk, debris from the old mattress and rusty springs falls on him in the lower bunk (263a).

Ronald Foy spoke of a similar but more serious problem. Since the cell toilet is only a foot and a half from the lower bunk, when his cellmate urinates "it splashes and comes on the head of my bed" (101a).

One of the most humiliating and dehumanizing aspects of double-celling in QHD and BHD is that a detainee must relieve himself using an unenclosed toilet in the close presence of his cellmate. Charles Bruner testified that he and his cellmate try to minimize the humiliation by turning away "out of respect" when the other uses the toilet (264a).

Ronald Foy finds it "degrading" to have to use the toilet in his cellmate's presence. When his cellmate uses the toilet he "...move(s) to the other side of the cell" to give him as much privacy as he can and to avoid "the odors" (113a). Foy lamented "...I don't like to be present when another man is going to the bathroom" (113a). Ronald Smith also stated that when his cellmate moves his bowels he turns away to

avoid the "smell" (232a). Antonio Negrón expressed the de-
basement he felt at being forced to smell his cellmate's
waste products (130a), as did Charles Bruner (263a).

Bruner summed up the helpless feeling detainees have
when locked into the tiny cells with another man and forced
to eat, sleep, and defecate in his presence:

...when I'm eating, right, and having a cell
partner, it's distracting if he wants to go to
the bathroom, defecate or something. I'm eat-
ing at the time and if its a rush thing, I
can't tell him: 'you can't go to the bathroom.
Wait until I finish eating' he can't tell me:
'put your food out of the cell;' or I'll go out.
There's no vehicle that we can split up at all.
Our cell is locked (260a-261a).

When asked to summarize why he preferred single celling,
Raymond Moctezuma responded: "privacy... that's one thing
that Brooklyn House doesn't have, privacy" (205a).

All detainees testified that there was not nearly enough
room in the cells for both men to eat their meals. As the
cells only have furnishings for one man, one detainee is al-
ways deprived of a table and seat and must eat his meal seated
either on the bed or the toilet (100a, 157a, 128a, 213a, 259a).
Mr. Negrón, who was housed for a long period with his brother,
stated that he and his brother "rotated" using the table and

seat (128a). Foy, Smith and Bruner testified they take their meals at their bunks (100a, 157a, 259a), Smith and Bruner both place a pillow on their lap as a makeshift table (157a, 259a). Smith, however, testified that using the pillow is awkward and food from the tray often spills (157a).

Some detainees expressed concern about the security of their personal property and papers because they had to share the small cells with another man. Unlike New York state institutions for convicted felons, the Federal Detention Facility at West Street, or even the Queens House of Detention prior to the 1970 riots, there are no facilities at Brooklyn or Queens for detainees to store their property (103a, 127a, 262a).*

Mr. Foy testified that his cellmate "likes to go through my things" (103a). Raymond Moctezuma claimed that his cellmate, as well, goes through his legal papers (203a). Antonio Negron was frustrated that he had no place to store his papers:

* Prior to the 1970 riot all cells in the Queens House were equipped with lockers for detainees to safeguard their property (262a). Warden Gengler testified that at the West Street Facility lockers are provided because "[s]ome of these people have valuable law papers and books, and I think it is incumbent upon us to provide as much security for their property and welfare as possible" (56a-57a).

"You got your personal letters", he said, "You don't want nobody to look at your personal letters" (130a).*

In addition to the difficulties presented by the congested, cramped quarters, the danger to personal property and the humiliation of having to perform bodily functions in the presence of another, was the fear of bodily harm detainees felt when locked in a cell with a person they did not know.

Charles Bruner stated "you don't know what type of cell-partner you get... He don't know what type of person I am" (263a). Raymond Moctezuma added "I don't know what this man is, his background is. Really, I don't know who the man is. He was just put in there with me" (203a). Antonio Negrón agreed "...you don't know the guy from the street..." (131a)

The problem is most serious, Ronald Smith testified, when a new detainee is introduced into the cell. Smith, who

* Warden Rubin, speaking in another connection, affirmed the value that detainees place on their personal property and stated that fights over property do occur:

"Most of them (detainees) are poor in background and they have a few meager belongings and they have it in the cell. I have seen fights go on over the stealing of another man's property" (520a).

in 33 months of confinement had over 20 cellmates (149a-150a), testified that when the new man comes:

It is like starting all over again...You get one cellie. Already you have been living together like you're almost married and like, all of a sudden, a new man comes in and you have got -- you're skeptical. You don't know the type of person he is. If he is a maniac, or what. You got to sleep with your eyes open and adjust your whole self again (151a).

Indeed, detainees testified that many times their skepticism and worst fears were well warranted. When Smith was a detainee at the Brooklyn House he once had a cellmate who threatened to hang himself (152a). In addition:

He would walk around with his clothes off, in the nude all the time. Then he plays in the toilet bowl (152a).

When Smith requested a transfer to another cell he was rebuked by a correction officer who sarcastically told him "Oh, your a psychologist now. You know if the man is sick or not. Stay in the cell" (153a). Finally Smith, fearing that he might be harmed, or that the man might commit suicide, demanded to be placed in punitive segregation (the "Bing") rather than endure continued confinement with his cell partner (153a).*

* In all Smith was forced to remain with the man two days (153a).

The detainee testimony demonstrated that under the pressure imposed by crowding two men into a cell, small things start to upset the cellmates and tensions begin to build (263a). Mr. Foy testified, for example, that because of his cellmate's "bad hygiene habits" (100a) he tried to wake up every morning before his cellmate to obtain the breakfast tray. Foy stated that if he failed to obtain the tray first his cellmate would put "...his finger in his nose and [put] his hand on my plate of food and [hand] it to me" (100a).

Ronald Smith confirmed the tension that cell partners feel:

A lot of nights, like I'll be restless. Really we don't trust each other. That's the whole thing about it. Sometimes, like I look up, I see him, I don't know what's on his mind, you know.

He tells me don't touch a few things. I tell him the same, you know. Like, what we do is like we try to stay [as] far apart from each other as possible (231a).

The detainees testified that they begin to act aggressively towards each other in this environment. For example, when Raymond Moctezuma wants to sit at the cell's lone desk he tells his cellmate to get "on his bunk" even though he

knows it will "irritate" him (204a). Moctezuma regrets having to take this action but "being that he's there I have to tell him this" (204a). Ronald Smith complained that his cellmate demands first right to use all furnishings because he has been in the cell longer. Smith, who has been incarcerated longer than his cellmate, albeit not in the same cell, voiced resentment that under this "seniority" system his only "right" was the use of the bed (158a).

Mr. Foy testified that

...my cell partner has problems with his family. He lost contact with his family and I have to act different toward him in the cell and he acts different toward me. There is a tension between the two of us because of this condition.

Now, we don't get along. I sometimes, sit at my bed and write letters and he runs the water and wets my letters up. I don't say nothing but it bothers me -- these things -- tension. It gets on my nerves (114a).

Raymond Moctezuma testified that he was almost driven to violence when his cell partner became ill:

A few days ago my cellmate was sick and he vomitted. He occupies the upper bunk and all that vomit came into my bunk. That really upset me. I wanted to swing at him... Then I held myself, being that the man was sick. It wasn't really his fault (202a-203a).

Ronald Smith described a typical conflict that cellmates experience. At night he often wants to read at the table before going to sleep. His cellmate prefers to sleep and is annoyed by the light:

He tells me I got to go to bed. He's going to put the lights out, put a cover over the lights. I told him, like what do I look like to you, a kid? Tell me what time to go to bed?

This is always leading to an argument every night. We almost got into a fight the other night because of that. He told me: I'll be glad when you leave (230a).

Antonio Negrón testified that he was almost driven to blows with his cell partner, even though the cell partner was his brother:

I love my brother. This is my brother. I have to get along with him for the rest of my life, no matter where I'm at. But I will tell you, it was hard. Several times we almost went to blows... it's kind of hard. For the other guys that ain't brothers, it's really hard for them (131a).

A restraining influence is the knowledge that violence, when it erupts between men caged in a locked cell, can be especially vicious. Although Warden West testified that fights were less prevalent among cellmates than between others (649a),

Charles Bruner pointed out that when fights do occur in the cells they can be horrible:

...if you ever get in a fight there, [in the cell] you more or less are going to end up killing each other...you fight harder in a cell than you would in a tier (264a).

Robert Finley, a 23 year old father of three, has never been convicted of any crime and this is his first experience with confinement (429a). At the time of trial he had been detained over 9 months (430a). One day Finley heard rumors that his cell partner of one month, was "going to mess him up" (433a, 436a, 447a, 451a).* Finley, having limited experience with incarceration, paid little attention to the rumor, assuming it was "just a bunch of talk" (433a). That night after he and his roommate were locked in the cell and he had just fallen asleep:

...all of a sudden like I felt this guy kicking me in the throat and in the chest and in the head, and just, you know, woke me up and we were fighting in the cell. (433a).

* At one time Mr. Finley had been housed in a cell by himself. He requested a transfer because both beds in the cell were broken and could not be used (450a).

Following the attack which lasted between 10 and 15 minutes (436a), Finley was "coughing up blood" (434a). He later required medical attention for swollen glands and chest injuries caused by his cell partner's kicks (434a).*

All of the detainee witnesses who had previously been incarcerated in the single cell system of the New York state penal institutions testified they preferred a cell to themselves rather than to be housed, as they were in Brooklyn and Queens, two to a cell (102a, 130a, 205a, 238a, 263a).

Based on the testimony adduced at trial the District Court found that double-celling was "dehumanizing" (959a).

Specifically it found that:

Two men cannot move about at the same time in the portion of the cell which is not utilized for bunks, table, seat, and toilet. Since the meals are fed to inmates in the cells and there is only one chair, only one man can use the table and the other must sit on the bed to eat; the choice of who eats on the bed is made in varying ways, depending on seniority, rotation, strength, or other factors. Disagreements concerning the choice of activities, embarrassment and discomfort in the use of the toilet in the presence of a

* Finley was later exonerated by jail officials when his cellmate explained the fight was his fault. The cellmate was punished by five days punitive segregation; Finley was returned to the floor (435a).

cell-mate, and disagreements concerning personal belongings are common. Fights and charges of theft are frequent, although fights between inmates who do not share cells are also common. Loss of privacy is one of the major results of double-celling (867a).

B. Other Effects of Overcrowding

In addition to the deprivations caused detainees from being confined two to a cell, correctional experts testified to a myriad of other severe consequences which flow from overcrowding. Dean McKay identified overcrowding as a primary cause of conditions that result in "inhumaneness in an institution (183a)." Donald Goff explained that with reference to BHD and QHD:

Again, we must go back to the fact that the physical plans [of BHD and QHD] were built for a particular maximum population. Corridor space, dayroom space, all of these are predicated upon a particular population. When you increase the basic housing population, you are cutting into and reducing the area per square foot that was originally figured out for corridors, lock-out corridors, for day rooms. You're immediately overloading the sanitary facilities... You have the same problem of human compression here. Corridors and lockout corridors that were built for fifteen men now house 25 or 30 (303a-304a).

These difficulties were confirmed by defendants' own witnesses. Assistant Deputy Warden Guzman, who is responsible for delivering services to detainees in Brooklyn, testified

that one of the real difficulties of his job was the presence of "a much larger number of people in the building daily than the place was built for" (733a-734a, 821a). The elevator facilities become congested, causing serious problems in moving detainees from their housing floors to the gymnasium, commissary and chapel. Gym and commissary schedules have had to be changed in order to reduce elevator tie-ups (734a). Deputy Warden Guzman added that at the present population level, the gymnasium in Brooklyn is not nearly big enough to accommodate the number of detainees who wish to use it (735a). The Deputy Warden agreed with Warden Rubin that he would like to be able to provide more "breathing space for detainees" (822a).*

The strain on facilities and manpower caused by overcrowding was illustrated by Warden Rubin's statement to the New York Correctional Association:

...[T]he biggest problem we face is the overcrowding, the heavy burden that is put on all our facilities... (603a)

*

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All of your facilities, the physical spaces, is just taking two men and putting them in a cell designed for one man, that is a problem right away. This is where the situation starts. (604a)

* Testimony also revealed that defendants' educational and recreational programs suffer from inadequate staffing, meet infrequently; and reach only a small percentage of the detainee populations in BHD and QHD. (Guzman, 807a-810a, 813a, 820a-824a; Rubin, 543a-544a, 546a; Moctezuma, 208a).

...right from the beginning, that is your problem. There are too many men in one spot... Just take a correction officer working on the floor. Ordinarily he would have 120 men, him and his partner..., [e]ach would be responsible for 60 men (605a).

I'm not saying they could handle 60 men effectively but it's another 120 men to count and 120 men to make sure they are fed and another 120 men to make sure they have showers ...[T]here is one shower on a tier. Now, you have got 30 men using that one shower. In the day rooms to sit down and watch T.V., we have to do it in shifts. Why, we can't put the whole section in there, that would be 60 men. They would be so tight in there, nobody could even enjoy the T.V... Whatever you're doing, you're doing double the amount (605a-606a).

* * *

Just delivering basic needs to the inmate, his food, so called shelter requirements, his blanket, sheet, pillow case, this is a major problem. If the machine breaks down in the laundry, we start to sweat. Why? I know the next day I won't be able to give them their laundry and all it takes is a little spark: we didn't get our laundry, well, wait until tomorrow. You tell that to a fellow who has just come back from court and the judge told him what he thought of him and the Legal Aid lawyer told him to cop out and his mother and father tell him: you got into this trouble, get out of it. And here comes the deputy warden: look, I can't give you a pillow case tonight. Who knows, he may be swinging out or he may decide his partner at the cell is not his partner any more and take a swing at him (606a).

Warden Rubin compared the problem of an administrator faced with an overcrowded jail population to trying to "run a prison in Times Square" (609a). "The first thing I would do", the Warden said in the interview, "is add more facilities to allow room, to allow breathing space" (607a).

ACA Standards require that 75 square feet be provided per inmate in the lock-out areas including the cells (Exhibit 4, p.49). Dr. Kinzel testified that areas provided at BHD and QHD fall far short of the standards and he concluded that the lock-out areas do not provide relief from the effects of overcrowding experienced in the cells (390a-391a).

Dean McKay testified that at present population levels the areas outside of the cells (i.e. the corridors and day rooms) are "confined" and "restricted" (181a). Before he was informed by the Corporation Counsel that in the parlance of this case time spent in these areas is considered lock-out time, the Dean had thought of it as "still lock-in" (181a).

The District Court made a specific finding that "the day rooms were constructed to accomodate the needs of the institutions under conditions of single cell occupancy, [and] with 60 men in a quadrant, two to a cell, instead of just 30, the day rooms are unduly crowded" (867a-868a).

The detainees testified that when they are permitted to leave their cells they attempt to get away from their cell and cell partner and find more open spaces. Ronald Smith testified that as soon as the cell opens and he is allowed out he "breathe[s] again (226a)."

However, there is little escape from overcrowded conditions for the lock-out areas as has been shown are as overcrowded and confining as the cells.

Detainees confirmed that the day rooms are indeed too small for an entire section to use at any one time. In Ronald Smith's words:

Once everybody is in the day room, that's 60 inmates in one day room. Like you can't take up all that space (236a).

In addition, the day rooms are inadequately equipped. Raymond Moctezuma testified that the day room on his housing floor has "no tables and a few chairs" (209a). Foy said that in his day room there were only "18 chairs for 60 men" (105a).* In Queens Ronald Smith said detainees have a seniority system

* Warden West conceded that in Brooklyn there is "not sufficient equipment available in the institution, not sufficient chairs for them [detainees] to use in the day rooms..." (634a)

to ration the few chairs in their day room:

...mostly everybody has their name on their chairs, you know, the ones that have been there the longest they got their own chair... They have a mark on the chair to tell them which chair it is (228a).

Smith stated that detainees who do not merit a chair must sit on the ledge (229a).

In Brooklyn, Ronald Foy testified the day rooms are utilized as handball courts (105a). Therefore, only four men at a time can use the day room (105a-106a). The other detainees are restricted to the narrow gallery where they "sit on the floor playing cards, chess, checkers" (106a).

On days when detainees are allowed to go to the gymnasium the overcrowding is unrelieved.* Raymond Moctezuma testified that in the gym 135 to 140 men shared one basketball court, one volleyball court and one ping pong table (211a). Ronald Foy and Antonio Negron also spoke of the limited,

* Detainees in QHD are permitted to go to the gym once per week (509a). In BHD some detainees go to the gym twice per week, others only once (732a).

The roof recreation area at BHD evidently is rarely used. Mr. Negron and Mr. Moctezuma, both of whom had been confined there for over one year, testified that in all that time they had never been allowed to go to the roof (135a-137a, 212a).

overtaxed facilities available in the gymnasium (108a, 134a).

The overcrowded lockout areas are often scenes of tension and violence. Ronald Smith who has had between four and six fights (235a, 244a) during his confinement, testified that he had a fight in the day room with a detainee over what to watch on television (235a-236a). Mr. Smith said there is "almost a fight every night" (234a).

Antonio Negron, who after 14 months of confinement was acquitted of the charge for which he was confined, summed up the trapped feeling detainees experience when "locked out" of the overcrowded cells:

...[W]e just walk back and forth...it closes in. If you have claustrophobia -- well, everything gets short. You get frustrated. Every little thing bothers you. A guy tells you this or that. You start building conflicts. Something inside starts snapping. You're about to snap at anything -- even good officers who are human. They come to do eight hours.

You're there, not guilty until you are proven, and you are subject to going through this hostility without being proven guilty (132a).

ARGUMENT

POINT

THE DISTRICT COURT PROPERLY HELD THAT SUBSTANTIAL OVERCROWDING AT THE BROOKLYN AND QUEENS HOUSES OF DETENTION RESULTING IN THE CONFINEMENT OF TWO PRE-TRIAL DETAINEES IN CELLS ADEQUATE FOR ONLY ONE, VIOLATES APPELLEES' RIGHTS UNDER THE UNITED STATES CONSTITUTION.

At the outset, it is important to note that the District Court's findings of fact in this case, based upon an extensive trial record, are not challenged as clearly erroneous. F.R.Civ. P. 52(a). Indeed, one of appellants' own wardens characterized forcing two detainees to live in single occupancy cells at BHD and QHD as "sort of dehumanizing", not a single defense witness defended the practice, and even appellants' own brief concedes that double-celling is "far from ideal" and "may be most unpleasant" (Appellants' Brief at pp. 24-25, 29). Rather, appellants contend that the District Court erred in its conclusion that overcrowding at BHD and QHD violates the United States Constitution. However, appellants' brief is devoid of any authority to support its position, is completely untenable after this Court's decision in Rhem v. Malcolm, _____ F.2d _____, Docket No. 74-2072 (2d Cir. November 8, 1974), affirming 371 F. Supp. 594 and 377 F. Supp. 995 (S.D.N.Y. 1974), and is totally

without merit given the overwhelming weight of authority against it.

In Rhem this Court recognized that the special status of pre-trial detainees, as persons confined for the very narrow and limited legal purpose of insuring their presence at trial, has substantial bearing upon the physical conditions to which they may be subjected. Accordingly, the Court adopted as the law of this Circuit the following principles:

The demands of equal protection of the laws and of due process prohibit depriving pre-trial detainees of the rights of other citizens to a greater extent than necessary to assure appearance at trial and security of the jail; and the same constitutional provisions prevent unjustifiable confinement of detainees under worse conditions than convicted prisoners. Rhem v. Malcolm, supra, slip op. at 381.

While the state certainly has the power in proper circumstances to detain appellees, this Court held that:

"...it is manifestly obvious that the conditions of incarceration for detainees must, cumulatively, add up to the least restrictive means of achieving the purpose requiring and justifying the deprivation of liberty." Hamilton v. Love, 328 F.Supp. 1182, 1192 (E.D. Ark. 1971) quoted with approval in Rhem v. Malcolm, supra, slip op. at 382.

In short, "[h]aving been convicted of no crime,...detainees should not have to suffer any 'punishment' as such, whether 'cruel and unusual' or not." Hamilton v. Love, supra, 328 F. Supp. at 1191.*

To enforce the constitutional rights of pre-trial detainees, courts have consistently required state and city officials to remedy overcrowding in pre-trial detention facilities. Taylor v. Sterrett, 344 F.Supp. 411, 423 (N.D. Texas 1972), aff'd in part, rev'd in part, 499 F.2d 367 (5th Cir. 1974) [Jail population limited to capacity]. Holland v. Donelon, Civil Action No.71-1442 (E.D. La. June 6, 1973) [Sheriff ordered to reduce jail population to rated capacity of 110]; Obalele v. McAdory, Civil Action No.72J-103(N) (S.D. Miss. June 8, 1973) [Jail limited to capacity of 100 persons unless written authorization of court obtained to increase population]; Hamilton v. Landrieu, 351 F.Supp. 549, 551 (E.D. La. 1972)

* While some courts have held that conditions similar to those in the instant case also violate the prohibition of the Eighth Amendment, this Court has held that detainees are protected from cruel and unusual punishment "as a matter of due process and, where relevant, equal protection". Rhem v. Malcolm, supra, slip. op. at 383; See also Johnson v. Glick, 481 F. 2d 1028, 1032 (2d Cir.), cert. denied 414 U.S. 1033 (1973).

[Jail population limited to capacity of 450 inmates]; Hamilton v. Love, supra, 328 F.Supp. 1182, 1195 (E.D. Ark. 1971) [Jail held to 115 person capacity]; Hodge v. Dodd, 1 Prison Law Reporter 263 (N.D. Ga. 1972) [Jail ordered closed; in interim population limited]; Jones v. Wittenberg, 323 F.Supp. 93 and 330 F.Supp 707, 714 (N.D. Ohio 1971), aff'd sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) ["The first change which must be made is a reduction of inmate population..."] See also Kinale v. Dowe, No. 73-374 (S.D. Cal., October 29, 1973) [Jail limited to maximum capacity as stipulated by parties].

These decisions are premised on the recognition that a jail crowded beyond its capacity is incapable of providing the "tolerable living environment" guaranteed to all prisoners. Kaufman, Book Review, 86 Harv. L. Rev. 637, 639 (1973). The courts have frequently pointed out that when jails are overpopulated beyond capacity, it is impossible to accord detainees the protection and minimal services necessary to render their confinement humane. For example, of the numerous deprivations visited upon detainees in the Dallas City Jail considered in Taylor v. Sterrett, supra, including lack of recreation and inadequate staff and facilities, one of the chief causes of

the problems, the court found, was "[t]he failure to provide necessary space to house the prisoner population..." 344 F. Supp. at 418. For without adequate space and facilities, none of the rights guaranteed detainees can realistically be provided. In this sense the right to be free from overcrowded conditions is preservative of almost all other protections necessary to insure the special status of detainees. See also Finney v. Arkansas Board of Correction, 505 F.2d 194, 201 (8th Cir. 1974) [district court directed "to devise a program to eliminate immediately [penitentiary] overcrowding] Cf. Wyatt v. Stickney, 325 F.Supp. 781, 334 F.Supp. 1341 (M.D. Ala. 1971), and 344 F.Supp. 373 (1972), aff'd sub nom. Wyatt v. Aderholt, 503 F.2d 1305, 1310 (5th Cir. 1974) [overcrowding deprives mental patients of a "humane psychological and physical environment"].

Indeed, the problems caused by overcrowding at pre-trial detention facilities are so great and have such pervasive negative effects upon every aspect of life in the institutions that there is not a single reported case in which a court has countenanced the overcrowding of a jail substantially beyond its actual capacity. As the court observed in Hamilton v.

Love, supra, unless jail populations are held to capacity "adequate constitutional standards cannot be met..." 328 F. Supp. at 1195.

Given the substantial weight of authority against overcrowding, both federal and state courts, in circumstances virtually identical to this case, have repeatedly enjoined double-celling in cells not designed for that purpose. Thus in Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, (D. Mass. 1973), aff'd as to remedy 494 F.2d 1196 (1st Cir. 1974), cert. denied 43 U.S.L.W. 3248 (Oct. 29, 1974) the court permanently enjoined double-celling in cells which were even larger than those in the case at bar (8' by 11'), finding that placing two men in a one-man cell is a "practice that is condemned by all authorities in the operation of adult detention facilities." 360 F.Supp. at 679, n.2.

In another case directly on point involving the St. Louis City Jail, the court held that confinement of more than one detainee in cells measuring 8' by 5' was in excess of what could be "humanely accomodate[d]," and thus enjoined the practice as unconstitutional. Tyler v. Percich, ____ F.Supp. ____, Civil Action No. 74-40-C(2) (E.D. Mo. October 15, 1974).

State courts, as well, have permanently enjoined the practice of double-celling as violating the Constitution. In Wayne County Jail Inmates v. Wayne County Board of Commissioners, Civ. Action No. 173217, p.3-14 (Cir. Ct. Wayne Co., Mich. July 28, 1972 and May 25, 1971), aff'd and remanded, 391 Mich. 359, 216 N.E. 2d 910 (Mich. 1974) the court ordered jail officials to cease confining more than one man in cells measuring 6' by 7' and 6' by 8'. See also Commonwealth ex rel. Bryant v. Hendrick, Nos. 353 and 354 (Ct. of Common Pleas, Phila. Co., August 11, 1970), aff'd, 448 Pa. 82, 280 A.2d 110, 115 (1971); Jackson v. Hendrick, No. 71-2437 pp. 13, 245-246 (Ct. of Common Pleas, Phila. Co. April 4, 1972) [constitutional rights of pre-trial detainees violated if two are confined in cells built to house only one man].*

* Appellant's reliance upon Johnson v. Lark, 365 F.Supp. 289 (E.D. Mo. 1973) and Jones v. Wittenberg, supra for the proposition that courts have held that double-celling in one man cells is constitutionally permissible (Appellants' Brief at 23,36) is erroneous. In both cases, as in this case, the courts were confronted with jail populations in excess of stated capacities; in both cases, the courts were asked to order populations reduced to stated capacities and in both cases the courts so ordered. Furthermore, since no party to either litigation contended that the official capacities were themselves inaccurate, the issue of single-cell occupancy was never considered. Significantly, when the issue was subsequently presented regarding the jail in question in Johnson, double-cell occupancy was enjoined. Tyler v. Percich, supra.

The effects of double-celling as described in Inmates of Suffolk County Jail, supra, are strikingly similar to those in the instant case. There the court found that when cells are adequate for only one "it is impossible for two men to occupy [the cell] without regular, inadvertent physical contact, inevitably exacerbating tension and creating interpersonal friction." 360 F.Supp. at 679. A detainee may well find himself confined with a "strange and perhaps vicious man," Id. at 687, a point well illustrated by the testimony herein of Mr. Finley and Mr. Smith, both of whom recounted frightening instances of being confronted with dangerous cellmates (152a, 433a). Furthermore, the court noted that detainees must face ever present indignities and loss of privacy:

When both inmates are in the cell, there is no room effectively to do anything else but sit or lie on one's cot. The presence of a cellmate eliminates any hope of privacy; an inmate may not use the toilet except in the presence of a stranger mere feet away. Id. at 687.

See also Taylor v. Sterrett, supra, 344 F.Supp at 418 [living in "overcrowded...cells has a dehumanizing effect on the persons subjected to these conditions"]. Thus double-celling, rather than promoting any sound correctional end, inevitably endangers

the security of an institution. Inmates of Suffolk County Jail, supra at 687.*

In the instant case the record is replete with both lay and expert testimony, virtually unchallenged, as to the consequences to those confined in the overcrowded double-cells at BHD and QHD. The testimony shows that with detainees forced to live in institutions operating between 150% to 167% over actual capacity, arguments, fights, and assaults frequently occur. Furthermore, the concept of personal privacy is nonexistent for persons unfortunate enough to be detained at BHD and QHD. Even more importantly, detainees are concededly forced to suffer the inevitable dehumanization and humiliation which accompanies having to eat, sleep, defecate, and urinate within a few feet of another person.

The uncontroverted record revealed that persons subjected to such conditions begin to act aggressivley even towards friends

* See also Burger, C.J., Our Options are Limited, 18 Vill. R. L. Rev. 168 (1972), criticizing conditions under which "two prisoners are crowded into a cell made 100 years ago for one prisoner...not more than 6 feet by 8 feet."

and close relations. Detainees fear bodily harm from fellow detainees and there is constant concern for the security of personal property. The record demonstrates that the security of the institution which the court below found includes "preventing harm to inmates from others in custody" (874a) is severely compromised.

The record also shows that overcrowding has harsh consequences beyond double-celling. It is hardly a tolerable environment when dayrooms are so cramped that detainees cannot sit down; when the recreation areas cannot begin to accomodate the number of men who want to use them; and when the number of showers fail to meet all minimal correctional standards.

The evidence introduced by plaintiffs on the negative effects of overcrowding was uncontroverted and was confirmed by defendants' own witnesses. Indeed, there is no more emphatic statement in the record of the devastating effect of overcrowding than Warden Rubin's observation that, despite all good intentions, running an overcrowded jail is comparable to trying to "run a prison in Times Square" (609a).

the practice of double celling pre-trial detainees is *per se* One case which

Moreover, the documentary evidence in the record further establishes that conditions which the District Court invalidated were in violation of all established minimum standards set by correctional authorities for the acceptable treatment of prisoners. American Correctional Association, Manual of Correctional Standards 49 (1966) ["All cells should be designed for the use of one prisoner [with] the minimum clear size of an interior cell...approximately 50 square feet...The housing unit should be so designed as to provide areas 75 square feet per inmate, including the cells and day room...[with] a minimum of one shower head for each 15 inmates"]; United Nations, Standard Minimum Rules for the Treatment of Prisoners, § 9(1) (1955) ["Where sleeping accommodation[s] [are] cells... each prisoner shall occupy...a cell...by himself"], See also United States Bureau of Prisons, The Jail: Its Operation and Management 102 (1970) [when detainees are doubled up in one-man cells "[b]oth the facility and the personnel are overworked and minimum standards cannot be met"]; National Sheriff's Association, Manual of Jail Administration, 39 (1970) ["cells should be planned for one prisoner occupancy, interior cells should be approximately 50 sq. ft."]; State of Illinois,

Municipal Jail and Lockup Standards, III B(7) and (8),
(1971) ["All cells shall be designated for the use of
one prisoner...the minimum size of each cell shall be
approximately 6' wide by 8' long...]*

Just last summer the City's own Board of Correction reiterated

* Placing two pre-trial detainees in one-man cells at Brooklyn and Queens also is contrary to New York Multiple Dwelling Law which provides sleeping quarters of less than 75 square feet floor space shall not be occupied by more than one adult. With two men in a cell, each cell provides only slightly more than a quarter of the statutory minimum floor space. McKinney's Multiple Dwelling Law § 31(6)(b).

Housing codes such as the New York Multiple Dwelling Law have been held applicable to city jails. See Wayne County Jail Inmates v. Wayne County Board of Commissioners, supra, 216 N.E. 2d 910, 913 ["Prisoners of Wayne County Jail had the right to be housed in a facility which complied with housing laws of the city and state"]. See also Jones v. Wittenberg, supra, 330 F.Supp. at 715. Although, it has not yet been judicially determined whether the New York Multiple Dwelling Law is applicable to New York City jails, the law illustrates New York's public policy that human beings ought not to be living in overcrowded quarters, and indicates quantitatively the measure by which overcrowding is determined.

its previously stated position that "no more than one inmate per operative cell should be the firm rule" for all of New York City's detention facilities. New York City Board of Correction, Report on the Future of the Manhattan House of Detention 41 (August 6, 1974). And the City itself, recognizing the seriousness of the problem, voluntarily agreed to be bound by court order to eliminate double-celling at the Tombs. See Rhem v. Malcolm, supra, 371 F.Supp. at 600, n.3.

The New York State prison system, following the established standards discussed above, does not subject convicted felons to double-celling. Dean McKay and Donald Goff, both of whom have observed New York State practices for many years, testified that single-cell occupancy is the rule in state institutions (171a, 303a). Not a single defense witness testified to the contrary.* Accordingly, appellees' right to equal protection of the laws is obviously violated since this Court has held that pre-trial detainees must not be held under conditions harsher than those prevailing for convicted felons. Rhem v. Malcolm, supra, slip op. at 381, 384. As Dean McKay

* Thus, the statement in appellants' brief (38) that the record is inconclusive regarding the state practice is simply inaccurate.

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testified the fact that convicts receive better treatment than detainees at BHD and QHD is "a world upside down" (173a).

II.

Appellants seek to avoid the overwhelming weight of authority supporting the decision below by advancing essentially three arguments, all of which have already been rejected by this Court in Rhem v. Malcolm, supra.

First, appellants argue that this case differs from Rhem in that here they are not prepared to concede that conditions facing detainees at BHD and QHD are "very uncomfortable" (Brief at 22-23), a concession relied upon by this Court in Rhem, slip op. at 384. However, the tenor of the City's brief is strikingly similar to their approach in Rhem, since they admit, as they must based upon the record, that the overcrowded conditions and double-celling to which appellees are subjected are possibly "most unpleasant" and certainly "far from ideal". (Brief at 25, 29). Thus appellants have repaired to new adjectives and in effect ask this Court to perceive a distinction of constitutional magnitude between conditions which in Rhem were "very uncomfortable" and those which here are "far from ideal" and "most unpleasant". However, as in Rhem the

proper result is arrived at by analysis of the facts - not their subjective coloration by counsel. The facts in this case demonstrate that double-celling is an unnecessary and degrading practice which even convicts in New York State prisons are not made to endure. As this Court held in Rhem

...[T]he District Judge did not have to decide whether conditions at the Tombs were so bad as to be 'cruel and unusual punishment', even for convicted felons: It is enough if the concededly 'very uncomfortable' conditions for detainees are so unnecessary as to be a denial of due process or compare so unfavorably with those accorded by the state to convicted defendants elsewhere as to deny equal protection of the laws. For it must always be remembered that detainees are not, as yet, guilty of anything, slip op. at 384.

Next, appellants argue that double-celling is not impermissible unless the totality of conditions at BHD and QHD are so deplorable than an absolutely "intolerable human environment" is created, (Appellant's Brief at 38). The City claims that since the practice of double-celling is the only issue raised by this appeal such an "intolerable" environment is not present.

However, appellants fail to note that numerous other conditions at BHD and QHD which are virtually identical to those invalidated by this Court in Rhem are the subject of

pending litigation in the Eastern District (see pp. 5-6 supra). These conditions include denial of contact visits, restrictive visiting hours, inadequate recreation, and other aspects of maximum security confinement. As this Court held in Rhem, subjecting all detainees to maximum security when a classification system could identify the approximately 20 percent for whom such constraints are necessary is constitutionally impermissible slip op. at 383 and 385-86. Yet the court below found, as did Judge Lasker with regard to the Tombs, that BHD and QHD "are basically maximum security institutions, although only a fraction of the detainees require maximum security" (865a) and that "the classification system at both institutions is inadequate" (873a).*

In any event, even if double-cell confinement were the only practice at issue in BHD and QHD, the record nevertheless shows conclusively that the practice is dehumanizing. In Rhem, this Court found appellants' description of worse conditions at other prisons "unpersuasive," since

This proves only that some jails are even less tolerable than the Tombs, not that the District Court here was necessarily in error slip op. at 384.

* Indeed, in this case Warden Rubin confirmed the estimate of plaintiffs' experts that only about 20 per cent of the detainees require maximum security (873a).

Lastly, the City appears to argue that the District Court's finding of unconstitutionality is erroneous since it might require that the City "build additional jail facilities to house its prisoners in Brooklyn and Queens" (Appellant's Brief at 30).

But the court's order does not by its terms require construction of new facilities. Indeed, the City does not specifically quarrel with the terms of the relief herein, which simply forbids involuntary double-cell occupancy and leaves the City the widest possible latitude in devising the appropriate method of obtaining compliance. The District Court's order is thus precisely the type of relief this Court sanctioned in Rhem, slip op. at 390.*

*To the extent that compliance with the court's judgment might require additional expenditures the city itself concedes that "under Rhem fiscal considerations are not a sufficient excuse for perpetuating intolerable conditions" (Appellant's Brief at 30). See also Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968) [humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations..."] (Blackmun, J.); Gates v. Collier, 501 F.2d 1291, 1320 (5th Cir. 1974). ["If the State chooses to run a prison it must do so without depriving inmates of the rights guaranteed to them by the Federal Constitution"]. Inmates of Suffolk County Jail, supra, 360 F. Supp. at 687; Hamilton v. Love, supra at 1194 ["Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights"]. Holt v. Sarver, 309 F. Supp. 362, 385 (E.D. Ark. 1970) ["Let there be no mistake in the matter...if Arkansas is going to operate a penitentiary system, it is going to have to be, a system that is countenanced by the Constitution of the United States"]. Cf. Wyatt v. Aderholt, supra, 503 F.2d at 1314-1315. [Argument by Governor of Alabama that court should treat fiscal difficulties of state as a factor in determining whether plaintiffs constitutional rights were violated rejected as "unpersuasive."]

In sum, appellants are unable to muster any serious challenge to the decision below, nor can they, for the District Court's Judgment remedies a condition which a virtual plethora of cases has determined to be of constitutional magnitude. Indeed, the condemnation of overcrowding such as exists at BHD and QHD is so universal that not a single authority can be cited for the proposition that the condition should be allowed to continue. The District Court's directive ending the dehumanizing practice of double-celling is no more than a proper recognition of this Court's admonition in Rhem that

[P]re-trial detainees are people, not outcasts, who are presumed to be innocent of any crime and who have rights guaranteed by the Constitution, as do we all, slip op. at 392.

The living conditions revealed by the record herein hardly accord appellees the dignity and respect to which they are entitled as unconvicted citizens. As in Rhem "such conditions cannot be condoned by continued inaction", slip op. at 393.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE JUDGMENT
OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Respectfully submitted,

WILLIAM E. HELLERSTEIN
JOEL BERGER
STEVEN A. HERMAN
MICHAEL B. MUSHLIN
Attorneys for Plaintiffs-Appellees

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February 13, 1975

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